THE DISTRICT COURT FOR THE STATE OF ALASKA

FOR THE FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JEFFREY D. SCOTT,	)
	)
Defendant.	)
	)

Case No. 4TO-S92-83 CR

MOTION TO DISMISS
(Filed Aug. 10, 1992)

COMES NOW the defendant, Jeffrey D. Scott, by and through his attorney, Sheri L. Donaldson, and hereby moves this Court to dismiss the action for lack of State jurisdiction. This motion is supported by the following memorandum.

DATED at Fairbanks, Alaska this 10th day of August, 1992.

TANANA CHIEFS CONFERENCE, INC.

/s/ Sheri L. Donaldson
Sheri L. Donaldson
Attorney for Mr. Scott

THE DISTRICT COURT FOR THE STATE OF ALASKA

FOR THE FOURTH JUDICIAL DISTRICT AT TOK

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
JEFFREY D. SCOTT,)
)
Defendant.)
)

Case No. 4TO-S92-83 CR

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
INTRODUCTION
(filed Aug. 11, 1992)

The defendant moves for dismissal of the complaint in this case for the reason that the State has no jurisdiction to prosecute; and the State Court has no jurisdiction.

STATEMENT OF FACTS

Based upon the complaint and police report filed in this case, the defendant is alleged to have illegally possessed a bull moose during a closed season under 5 A.A.C. 92.140(a). (See Exhibit A). According to the complaint and police report, a moose is alleged to have been shot by Lavelle Jimmie, an Athabascan Indian from Northway, on May 8, 1992. (See Exhibit B and C). According to the police report by Trooper Thorsrud of the Alaska State Troopers in Tok, Lavelle Jimmie shot the moose because it was limping. According to a taped conversation between Lavelle Jimmie and Trooper Thorsrud, the moose was shot by Lavelle because it had a broken leg. (See Exhibit D. Tape Transcript between Trooper Thorsrud and Lavelle Jimmie).

The trooper never asked any of the suspects where the moose was shot. There is evidence that the moose was shot in the Tetlin Wildlife Refuge, on federal land.

Interestingly enough, the complainant State Trooper, Trooper Thorsrud, did not even report this "illegal moose kill" to federal Fish and Wildlife officials located at the Tetlin Wildlife Refuge, according to federal Fish and Wildlife officer Bob Schultz at the refuge.

The moose was shot on the north bank of the Nabesna River upriver from the Native Village of Northway, located approximately 250 miles away from Fairbanks. The location of the alleged harvest is on land which has been interim conveyed to the Northway Native, Inc. (Village corporation for Northway). (See Exhibit E). The interim conveyance of the tract (designated I.C 964) was made pursuant to the Alaska Native Claims Settlement Act, P.L. 92-203, Section 12. (See Exhibit F). Interim Conveyance 964, November 9, 1984, conveys only surface rights to the village corporation. Sub-surface rights for the same tract was conveyed to Doyon Regional Corporation pursuant to Interim Conveyance 965. (See Exhibit G).

The historic ancestors of the native village of Northway are confirmed by the presence of Upper Tanana Athabascan peoples residing on the Chisana and Nabesna drainages at the time of direct white contact in the 1880s. Martha F. Case, Wild Resource Use in Northway, Alaska, Published by the Alaska Department of Fish and Game, Division of Subsistence, June 1986, page 14. In the 1920s, the Old Nabesna camp on the east bank of the Nabesna River had reportedly been in use for two generations by members of the Old Nabesna band. Id. at page 19. The Old Nabesna band inhabited the lower Chisana River from Gardiner Creek to its mouth, and the lower Nabesna River from approximately the Cheslina River to the mouth, and the confluence of the two rivers and the beginning of the Tanana River. Id. at page 24.

Members of this band travelled northward to the upper Ladue drainage, and utilized the lakes and streams south to the Black Hills east of the Nabesna River. Id. This constitutes an area approximately 50 miles north-south and 25-30 miles east-west. Id. Two camps on the Nabesna River, called Nabesna Village or Old Nabesna, and Dry Creek, as well as several fish camps in the lower Nabesna and Chisana river area were occupied by this bank in the mid-20th century. Id.

Several trading posts were managed in the area, beginning in 1909 and 1910 with excursions by a Captain Northway from Fairbanks to the lower Nabesna River. Id. at page 16. Four posts were located over the years near a camp site of the lower Nabesna River people near the present community of Northway. Id. In the early 1940s the Old Nabesna settlement moved to its present location aong [sic] the east bank of the Nabesna River to avoid river erosion. Id. at page 17. The Alaska Highway along the northern edge of the valley was completed in 1942, and an airstrip was constructed approximately seven miles south of the highway, and two miles from the Nabesna village. Id. A graded road connected the airstrip and village to the highway. Id. A post office was established in 1941, and the village name was changed to Northway. Id. The population grew from approximately 100 residents in the early 1940s to over 300 by 1980. Id. A 1984 study of Northway households by

ethnicity shows that 97% of the members of Northway Village are Alaska natives. Id. at page 35.

Contemporary hunting areas for residents of the Native Village of Northway fall within former band territories, the descendants of which comprise a large portion of the current local hunting population. Id. at page 59. Northway residents harvested an estimated total of 90,091 edible pounds of wild resources between June 1987 and May 1988. Marcotte, James R., Wild Fish and Game Harvest and Use by Residents of Five Upper Tanana Communities, Published by the Alaska Department of Fish and Game, Division of Subsistence, December 1991, page 121. Moose hunting was the second largest contributor comprising 26.8 percent of the harvest, with whitefish harvest the highest harvest. Id.

Athabascan is a linguistic family which includes Indians from Alaska, across Canada and extending down to the Mexico border. See John R. Swann, Indian Tribes of Alaska and Canada, A Reprint of a Portion of "The Indian Tribes of North America" first published in Washington, D.C., 1952.

The governmental organization of these semi-nomadic Indian tribes was not a complicated one. Each tribe was headed by an elected chief who had only as much authority as the individuals were willing to grant him. Handbook of North American Indians, Subarctic. W.C. Sturtevant, J. Helm, Eds., at pg. 598.

The Athabascans of interior Alaska populated the region since prior to the coming of the Russians in 1843. The Indians of the Interior were the last to come into contact with white men. When non-Natives entered the Interior of alaska, they came first to trade and later, generally, to exploit the natural resources of the indigenous peoples' territories. At first, the traders located their trading posts in or near the Natives' semi-permanent settlements or ceremonial meetings places. Later, the trading posts were placed at a distance from the Native Villages as the clash of cultural expectations between the Indians and the traders made the traders uncomfortable in close proximity of the Indians. See Compilation of Narratives of Explorations in Alaska, Washington Government Printing Office, 1900, Schwatka, pp. 341, 343; Raymond, pp. 36-37; Clarence C. Hulley, Alaska: Past and Present, Binfords & Mort, Publishers, Portland, Oregon, 1958 at pg. 27; 222-229.

After the arrival of the explorer and trader, the church came soon after, and then the miner. Alaska Past and Present, Id. at pp. 222-229. For the most part, the explorer and the miner were transients, leaving for new discoveries, new strikes, and new territories. There remained the trader, the church and the Tribes.

STATEMENT OF LAW

Unless Congress has expressly ceded its authority, a State is without authority to manage hunting and fishing in "Indian Country." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

In Native Village of Tyonek v. Puckett et. al., pg. 346, (9th Cir. No. 87-3569, Jan. 13, 1992), the court held that the native Village of Tyonek qualified for sovereign immunity, and that its officers were also protected from liability based on derivative sovereign immunity for enforcement of a village ordinance requiring the eviction of non-tribal members from village territory. The Court stated that the village was under the superintendence of the federal government. Id. at 354. This test is met when the Government treats Indians as a "dependent people" requiring government superintendence, regulation, and protection. Id. The Court had previously held that Alaska Natives "have been considered to have the same status as other federally recognized American Indians . . .they are under the guardianship of the federal government and entitled to the benefits of the special relationship." Id. In addition, although the village holds its land in fee simple, the government has continued to regulate the affairs of Alaska Natives by passing legislation to protect their welfare and lands. Id.; See Alaska National Interest Lands Conservation Act, 16 U.S.C. 3111(4); Indian Child Welfare Act, 25 U.S.C. 1901(2) & (3). The record also demonstrated that the village received assistance from various government agencies which provided the village with federal services and funds such as educational and housing grants. Id. at 355. This involvement by the government recognized the village's continuing dependence on federal help and involvement and fulfilled the Indian Country test. Id.

The Court in Tyonek held that ANSCA corporations may be considered "Indian Country". Id. at 354. The Court invoked the test articulated in Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S.Ct. 905, 910 (1991), which held that Indian Country comprises lands which have been set apart for use of the Indians "under the superintendence of the government".

On March 16, 1992 the Ninth Circuit Court of Appeals issued a new opinion, and withdrew their January 13, 1992 opinion. In that opinion, the Court stated that they had not addressed the question previously whether any Alaskan native village constituted an Indian tribe for the purpose of sovereign immunity. See Native Village of Tyonek v. Puckett, et. al., No. 87-3569, pg. 9 (9th Cir. March 16, 1992). The Court stated that the District Court had failed to enter express findings of facts or develop a record to support its conclusion that the Native Village of Tyonek is an Indian tribe protected by sovereign immunity. Id. Accordingly, the Court remanded to the District Court so that an adequate

record could be prepared so that they could review this complex factual question. Id.; Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988).

LEGAL ARGUMENT

In this case, it is clear that the land where the moose was shot was located on "Indian Country", within the jurisdiction of the Native Village of Northway. The land in question was undeveloped subject to restrictions on the title, created by federal statute. Consequently, the land is exempt from adverse possession, real property taxes, execution to satisfy debts, and alienation through bankruptcy. 43 U.S.C. Section 1636. This statutory scheme clearly establishes a protective relationship between the tribe and the federal government.

There is also ample evidence that the village receives federal assistance for education, housing, native health funds for clinics, prevention programs, safe drinking water and sanitation; Indian family and social service programs; protection of wildlife on lands owned by tribes or ANSCA corporations; and programs for employment of Indians. See Affidavits of Reva Shircel, Exhibit H; Don Shircel, Exhibit I; Al Ketzler, Sr., Exhibit J.

The defendant and the other residents of the Native Village of Northway live within this scheme of federal protection, and the lands held by Northway Natives, Inc. are an integral part of the federal government's protective relationship to the Native Village. The land is inseparable from the overall relationship existing between the federal government and the residents of the native village. As reflected by the federal government's regulation and legislation for the benefit of the Native Village of Northway and other native villages, the federal government exists as a benevolent overseer and protector of the Native Village of Northway and its residences.

In conclusion, it is clear that the Village corporation lands are "Indian Country", and the State of Alaska is without jurisdiction to regulate an manage fish and wildlife thereon.

For the foregoing reasons the complaint and action against the defendant should be dismissed for want of jurisdiction.

DATED this 11th day of August, 1992 in Fairbanks, Alaska.

TANANA CHIEFS CONFERENCE, INC.

/s/ Sheri L. Donaldson
Sheri L. Donaldson
Attorney for Mr. Scott

THE DISTRICT COURT FOR THE STATE OF ALASKA

FOR THE FOURTH JUDICIAL DISTRICT AT TOK

STATE OF ALASKA,	)
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Plaintiff,	)
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vs.	)
	)
JEFFREY D. SCOTT,	)
	)
Defendant.	)
	)

Case No. 4TO-S92-83 CR

AFFIDAVIT OF REVA SHIRCEL

State of Alaska	)
	) ss.
Fourth Judicial District	)

REVA SHIRCEL, being duly sworn, upon oath, deposes and states as follows:

1. That I am the Director of Education for Tanana Chiefs Conference, Inc.;

2. That Tanana Chiefs Conference, Inc. is a non-profit corporation organized under the laws of the State of Alaska and is a "tribal organization" as defined by the Indian Self Determination Act, P.L. 93-638, Section 4(c);

3. That as a tribal organization TCC is eligible under section 102 of the Act to enter into contracts with the Departments of the Interior, Health, Education and Welfare, for the administration of programs established under federal law for the benefit of Indians;

4. That my job as Director of Education I am in a position to know about federal grants and programs for Indian Education which affect the native villages in the TCC region;

5. That in the fiscal year 92, approximately $10,895 was received for the Northway school from the federal Johnson O'Malley program for cultural heritage activities for elementary and secondary school Indian children.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 11th day of August, 1992 at Fairbanks, Alaska.

/s/ Reva Shircel
Reva Shircel

SUBSCRIBED AND SWORN TO before me this 11th day of August, 1992 at Fairbanks, Alaska.

/s/ Gloria J. Weltman
Notary Public in and for the State of Alaska
My Commission Expires on: 8/29/95

THE DISTRICT COURT FOR THE STATE OF ALASKA

FOR THE FOURTH JUDICIAL DISTRICT AT TOK

STATE OF ALASKA,)
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Plaintiff,)
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vs.)
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JEFFREY D. SCOTT,)
)
Defendant.)
)

Case No. 4TO-S92-83 CR

AFFIDAVIT OF DON SHIRCEL

State of Alaska)
) ss.
Fourth Judicial District)

Don Shircel, being duly sworn, upon oath, deposes and states as follows:

1. That I am the Director of Family Services for Tanana Chiefs Conference, Inc.;

2. That Tanana Chiefs Conference, Inc. is a non-profit corporation organized under the laws of the State of Alaska and is a "tribal organization" as defined by the Indian Self Determination Act, P.L. 93-638, Section 4(c);

3. That as a tribal organization TCC is eligible under section 102 of the Act to enter into contracts with the Departments of the Interior, Health, Education and Welfare, for the administration of programs established under federal law for the benefit of Indians;

4. That in my job as Director of Family Services I am in a position to know about federal grants and programs for Indian Family Services which affect the native villages in the TCC region;

5. That in fiscal year 92, approximately $13,860 was received for the Native Village of Northway for the low-income Home Energy Assistance Program;

6. That 32 villages of the TCC service area, including Northway, shared on a pro rata basis in a fiscal year 92 appropriation of

$85,000. from the Indian Child Welfare Act grant filed by TCC on their behalf as a federally-recognized tribe.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 11th day of August, 1992 at Fairbanks, Alaska.

/s/ Don Shircel
Don Shircel

SUBSCRIBED AND SWORN TO before me this 11th day of August, 1992 at Fairbanks, Alaska.

/s/ Susan Paskvan
Notary Public in and for Alaska
My Commission Expires on: 9/27/93

THE DISTRICT COURT FOR THE STATE OF ALASKA

FOR THE FOURTH JUDICIAL DISTRICT AT TOK

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
JEFFREY D. SCOTT,)
)
Defendant.)
)

Case No. 4TO-S92-83 CR

AFFIDAVIT OF AL KETZLER, SR.

State of Alaska)
) ss.
Fourth Judicial District)

Al Ketzler, Sr., being duly sworn, upon oath, deposes and states as follows:

1. That I am the Chief Administrative Officer for Tanana Chiefs Conference, Inc., (TCC);

2. That Tanana Chiefs Conference, Inc. is a non-profit corporation organized under the laws of the State of Alaska and is a "tribal organization" as defined by the Indian Self Determination Act, P.L. 93-638, Section 4(c);

3. That as a tribal organization TCC is eligible under section 102 of the Act to enter into contracts with the Departments of the Interior, Health, Education and Welfare, for the administration of programs established under federal law for the benefit of Indians;

4. That in my job as Chief Administrative Officer I am in a position to know about federal grants and programs which affect the native villages in the TCC region;

5. That as an Indian Tribe recognized under federal law, the Native Village of Northway is figured into funding formulas and shares in the benefits of federal programs and grants intended to benefit Indians;

6. That these programs and grants have included, but are not limited to:

(a) Administration for Native Americans for assistance in rural economic development and preparation of a model code for tribal courts, (1989-1991);

(b) Bureau of Indian Affairs contracts for the management of employment, health services, social services, housing, education, forestry, tribal operations, agriculture, wildlife and parks, and realty;

(c) Indian Child Welfare grants from the BIA, which grants are intended to provide counseling coordination and support to Native families;

(d) The Intertribal Agriculture Council;

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 11th day of August, 1992 at Fairbanks, Alaska.

/s/ Al Ketzler, Sr.
Al Ketzler, Sr.

SUBSCRIBED AND SWORN TO before me this 11th day of August, 1992 at Fairbanks, Alaska.

/s/ Perry R. [illegible]
Perry R. [?]
Notary Public in and for the State of Alaska
My Commission Expires on: 6/1/96